Mudek Sdn Bhd v Kerajaan Malaysia

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(IM)-100 OF 2011
CLEMENT SKINNER, MAH WENG KWAI JJCA AND HAMID SULTAN J
1 MARCH 2013

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Revenue Law — Real property gains tax — Liability for payment of — Vendor of land denied liability to pay real property gains tax ('RPGT') due to purchaser's failure to settle full purchase price — Whether there was 'disposal' and accrual of 'chargeable gain' as defined under Real Property Gains Tax Act 1976 — Whether property must be completely disposed of or purchase pricefully paid before liability to pay RPGT could attach — Whether vendor's failure to appeal assessment of RPGT made assessed amount final and conclusive and due and payable — Whether application for summary judgment of tax so payable could be challenged

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The appellant ('Mudek') sold a piece of land to another company for RM31.7m. Under the terms of the sale and purchase agreement ('SPA') the purchaser's solicitors were required to retain RM765,477.84 from the purchase price to pay real property gains tax ('RPGT') payable by Mudek. Mudek contended that the solicitors failed to retain that sum or to pay it over to the Inland Revenue Department. The respondent sued Mudek in the High Court for recovery of the RPGT due and payable plus a 10% penalty thereon. Summary judgment for the amount was granted by the court. In its instant appeal, Mudek claimed the decision to allow summary judgment under O 14 of the Rules of High Court 1980 was wrong as it had raised triable issues which warranted a full trial. Mudek contended that the respondent's claim against it was premature as its disposal of the land had not been completed due to the purchaser's default in payment of the purchase price and that, accordingly, there was no 'chargeable gain' or 'disposal' of the land within the meaning of those terms under the Real Property Gains Tax Act 1976 ('the Act'). Mudek had filed two civil suits against the purchaser in respect of the purchase price payable under the SPA.

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Held, allowing the appeal with costs of RM5,000:

(1) The Act would only be triggered if there was a disposal as envisaged in s 3 of the Act. It would be wrong for the Revenue Department to raise an assessment when in law and fact the assessee was not liable to RPGT at the material time. Further, paras 15 and 16 of Schedule 2 of the Act in relation to s 7 (chargeable gains and allowable losses) fortified the argument that there must be complete disposal or receipt of the purchase price before liability could be attached (see paras 12 & 15).

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(2) The said para 16 qualified the date of disposal when it was a conditional contract such as the instant case where the appellant was arguing that there was a breach and there were two suits pending before the court which, in our view, stood as triable issues (see para 13).

(3) The appellant had raised triable issues which ought to be ventilated at a full trial taking into account that the Act would not apply to all persons and the *sine qua non* for the Revenue Department to trigger the Act must relate to a disposal as envisaged by the Act (see para 16).

(4) (per **Clement Skinner JCA, dissenting**) None of the matters relied on by the appellant were capable of raising a triable issue to the respondent's claim. If the appellant was aggrieved by the notice of assessment because it had allegedly not 'disposed' of its land, it should have appealed against the assessment to the Special Commissioners of Income Tax under s 18 of the Act. The fact that the appellant did not do so but had instead asked the purchaser's solicitors to release the retention sum to enable payment of the RPGT showed that the appellant's arguments based on no 'disposal' and no 'chargeable gain' were issues that had been thought up to give the semblance of there being a bona fide triable issue (see para 25).

(5) (per **Clement Skinner JCA, dissenting**) The lack of bona fides in the appellant's contentions was exposed by the fact that in its two civil suits against the purchaser the appellant pleaded that the reason why the RPGT had not been paid was because the purchaser had not paid or released the retention sum for the RPGT and not because there was no 'disposal' or no 'chargeable gain' (see para 25).

(6) (per **Clement Skinner JCA, dissenting**) On the facts of the case not only had the assessment become final and conclusive against the appellant under s 20(1) of the Act (ie upon expiry of the time limited for appealing against the assessment, which the appellant failed to do); it had also become due and payable under s 21(1). In addition, the Director-General of Inland Revenue had, for the purposes of the O 14 proceedings at the High Court, issued a certificate under s 48(1) of the Act stating the amount due from the appellant (see paras 13 & 15).

[Bahasa Malaysia summary

Perayu ('Mudek') telah menjual sebidang tanah kepada syarikat lain untuk RM31.7 juta. Di bawah terma-terma perjanjian jual beli ('PJB') peguamcara pembeli dikehendaki memegang RM765,477.84 daripada harga belian untuk membayar cukai keuntungan harta tanah ('CKHT') yang kena dibayar oleh Mudek. Mudek berhujah bahawa peguamcara telah gagal memegang jumlah tersebut atau untuk membayarnya kepada Jabatan Hasil Dalam Negeri. Responden telah menyaman Mudek di Mahkamah Tinggi untuk mendapat balik CKHT yang terhutang dan kena dibayar bersama penalty sebanyak 10% daripada itu. Penghakiman terus untuk jumah itu telah diberikan oleh

mahkamah. Dalam rayuan ini, Mudek mendakwa keputusan untuk membenarkan peghakiman terus di bawah A 14 Kaedah-kaedah Mahkamah Tinggi 1980 adalah salah kerana ia telah menimbulkan isu-isu yang perlu dibicarakan yang mewajarkan perbicaraan penuh. Mudek berhujah bahawa tuntutan responden terhadapnya adalah pramatang kerana jualan tanah olehnya belum selesai akibat daripada kegagalan pembeli membayar harga belian dan bahawa, sewajarnya, tiada 'chargeable gain' atau 'disposal' ke atas tanah itu dalam maksud terma-terma di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('Akta tersebut'). Mudek telah memfailkan dua guaman sivil terhadap pembeli berkaitan harga belian yang kena dibayar di bawah PJB itu.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM5,000:

(1) Akta tersebut hanya akan terpakai jika terdapat pelupusan seperti yang terkandung dalam s 3 Akta tersebut. Adalah lebih salah untuk Jabatan Hasil untuk menaikkan taksiran apabila dari segi undang-undang dan fakta orang yang dikenakan taksiran itu tidak bertanggungjawab untuk CKHT pada masa matan. Selanjutnya, perenggan-perenggan 15 dan 16 Jadual 2 Akta tersebut yang berkaitan dengan s 7 (keuntungan boleh dikenakan cukai dan kerugian yang boleh dibenarkan) mengukuhkan hujah bahawa perlu ada pelupusan lengkap atau penerimaan harga belian sepenuhnya sebelum liabiliti boleh wujud (lihat perenggan 12 & 15).

(2) Perenggan 16 melayakkan tarikh pelupusan apabila ia adalah kontrak bersyarat seperti mana dalam kes ini yang mana perayu berhujah bahawa terdapat pelanggaran dan terdapat dua guaman yang belum selesai di hadapan mahkamah yang mana, pada pendapat mahkamah ini, adalah isu-isu yang perlu dibicarakan (lihat perenggan 13).

(3) Perayu telah menimbulkan isu-isu yang perlu dibicarakan yang patut dikemukakan dalam perbicaraan penuh dengan mengambil kira bahawa Akta tersebut tidak akan terpakai kepada semua orang dan *sine qua non* untuk Jabatan Hasil menggunakan Akta tersebut hendaklah berkaitan dengan pelupusan sebagaimana termaktub dalam Akta tersebut (lihat perenggan 16).

(4) (oleh **Clement Skinner HMR, menentang**) Perkara-perkara yang dikemukakan oleh perayu mampu menimbulkan isu yang perlu dibicarakan terhadap tuntutan responden. Jika perayu terkilan dengan notis taksiran kerana ia dikatakan tidak 'dispose' tanahnya, ia patut telah merayu terhadap taksiran terebut kepada Suruhanjaya Khas Cukai Pendapatan di bawah s 18 Akta tersebut. Fakta bahawa perayu tidak berbuat demikian tetapi sebaliknya meminta peguamcara pembeli melepaskan jumlah pegangan itu untuk membolehkan bayaran CKHT menunjukkan bahawa hujah perayu berdasarkan tiada 'disposal' dan

tiada 'chargeable tax' adalah isu-isu yang telah difikirkan untuk memperlihatkan terdapat isu bona fide yang perlu dibicarakan (lihat perenggan 25).

(5) (oleh **Clement Skinner HMR, menentang**) Bona fide yang tidak mencukupi dalam hujahan perayu telah ditunjukkan melalui fakta bahawa dalam dua guaman sivilnya terhadap pembeli, perayu telah mempli bahawa sebab mengapa CKHT tidak dibayar adalah kerana pembeli tidak membayar atau melepaskan jumlah pegangan untuk CKHT dan bukan kerana tiada 'disposal' atau tiada 'chargeable tax' (lihat perenggan 25).

(6) (oleh **Clement Skinner HMR, menentang**) Berdasarkan fakta kes bukan sahaja taksiran itu muktamad dan konklusif terhadap perayu di bawah s 20(1) Akta tersebut (iaitu apabila luput tempoh terhad untuk merayu terhadap taksiran itu, yang mana perayu gagal berbuat demikian); ia juga menjadi terhutang dan kena dibayar di bawah s 21(1). Tambahan pula, Ketua Pengarah Hasil Dalam Negeri telah, bagi tujuan prosiding A 14 di Mahkamah Tinggi, mengeluarkan sijil di bawah s 48(1) Akta tersebut menyatakan jumlah yang terhutang daripada perayu (lihat perenggan 13 & 15).]

Notes

For a case on liability for payment of, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 2782.

Cases referred to

Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29, FC (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680 (refd)

Binastra Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2001] 5 MLJ 481; [2003] 5 CLJ 221, HC (refd)

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473; [1989] 1 CLJ (Rep) 9, SC (refd)

Comptroller of Income Tax v A Co Ltd [1966] 2 MLJ 282 (refd)

Connaught Housing Development Sdn Bhd v Kerajaan Malaysia [2003] 4 MLJ 753; [2003] 8 CLJ 144, HC (refd)

Government of Malaysia v Abdul Rahman [1975] 1 MLJ 276 (refd)

Government of Malaysia v Margaret Au Nyat Fah [2007] MLJU 608; [2007] 1 LNS 436, HC (refd)

Government of Malaysia v Sim Soe Hoe [1990] 1 MLJ 379; [1990] 2 CLJ (Rep) 72, HC (refd)

Ketua Pengarah Hasil Dalam Negeri v The Pataling Rubber Estates Limited [2010] MLJU 1301, HC (refd)

Matair bin Suhaili & Anor v Rose Foo Chin Lan & Ors [2007] 6 MLJ 125; [2007] 5 CLJ 406, CA (refd)

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35, FC (refd)
Saratogoa Sdn Bhd v Pentadbir Tanah Johor Bahru [2013] 4 MLJ 431, CA (refd)
Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)

Legislation referred to

Income Tax Act 1967 ss 3, 99, 99(1), 103(1), (4), 106(1), (3)
Real Property Gains Tax Act 1976 ss 2, 3, 3(1), 7, 13, 18, 14(1), 18(1), 20(1), 21(1), (4), 23, 23(1), (3), 48(1), Schedule 2 paras 15, 15(1), 15(1)(a), (1)(b), (2), (3), 16
Rules of the High Court 1980 O 14

Appeal from: Civil No MT1–21–50 of 2008 (High Court, Shah Alam)

Deborah J Kaur (Soraya Jabid, Deborah & Co) for the appellant.
Mohd Harris Hanapi (Nur Farahaida Kamarudein with him) (Senior Federal Counsel, Revenue Solicitors and Revenue Counsel Cyberjaya) for the respondent.

Hamid Sultan J (delivering majority decision of the court):

[1] This appeal was heard on 27 November 2012 and judgment was reserved for decision on 25 February 2013. The dissenting judgment is delivered by my learned brother Datuk Clement Allan Skinner. My learned brother Dato' Mah Weng Kwai has read the majority judgment and approved the same. This is the judgment of the majority.

BRIEF FACTS

[2] The appellant appeals against the decision of the learned High Court judge who allowed the plaintiff to enter summary judgment in respect of a purported claim for chargeable gain pursuant to the Real Property Gains Tax Act 1976 ('the Act').

[3] The central complaint of the appellant is that the Act in the instant case is not triggered as there is no chargeable gain as stated in s 3 of the Act and the property has not been disposed of or the purchase price received pursuant to s 2 of the Act. Section 3(1) of the Act states:

> (1) A tax, to be called real property gains tax, shall be charged in accordance with this Act in respect of chargeable gain accruing on the disposal of any real property (hereinafter referred to as 'chargeable asset').

[4] Section 2 of the Act on the meaning of dispose states:

'dispose' means, subject to subsection (4), sell, convey, transfer, assign, settle or alienate whether by agreement or by force of law.

[5] In the instant case it is not in dispute that the appellant has entered into a sale and purchase agreement with Yeng Chong Realty Sdn Bhd ('the purchaser'). It is alleged the purchaser has not fulfilled the condition of sale and the appellant has filed two suits in the High Court namely, Writ Summons No S-22–1468 of 2005 and No S-22–448 of 2005 for the default in payment of the purchase price. In essence the appellant argues the property because of non payment has not been disposed of yet within the meaning of s 2 of the Act for the respondent to raise any assessment on 'chargeable gain' as envisaged by s 3 of the Act. In consequence the appellant argues that the issue stated above will stand as a triable issue and also the appellant is candid in asserting that if there is a disposal then the respondent is entitled to raise an assessment and any dispute as to assessment must be referred to the Special Commissioners as provided for under s 18 of the Act which states:

(l) A person aggrieved by an assessment made on him may appeal to the Special Commissioners against the assessment in the same manner as an appeal against an assessment of income tax made under the Income Tax Act 1967, and sections 99, 100, 101, 101(A), 101(1B), 101(1C) and 102 of that Act, as far as they are applicable and with the necessary modifications, shall apply to an appeal against an assessment made under this Act as if —

(a) Every reference in those sections to income tax or to tax were a reference to real property gains tax; and

(b) Every reference in those sections to income were a reference to chargeable gains.

[6] In addition the appellant also argues as an alternative ground that on the facts of the case whether the assessment must be made under the Income Tax Act 1967 ('ITA 1967') or the Act is also an issue as the property was sold by a company. The appellant relies on the case of *Binastra Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2001] 5 MLJ 481; [2003] 5 CLJ 221 (pp 80–93 appellant's bundle of authorities), where it was stated:

… When a company sells the property, RPGT cannot be imposed and the assessment is under income tax. Therefore in this instance, the asset of the company was not real property comprising land, but stock in trade with no chargeable asset under RPGT.

[7] The appellant also takes issue that the notice was not duly served and/or received by the appellant. We do not think it is necessary for us to deal with the issue for reasons stated below.

THE RESPONDENT'S SUBMISSION

[8] Learned counsel for the respondent concedes that there is no case directly on point on the Act issue and attempts to rely on cases relating to the Income Tax 1967. We do not intend to deliberate on the submission of the respondent in detail save to say that the ITA 1967 and the Act for the purpose of assessment and subsequent recovery is not one and the same and the provisions and/or case laws cannot be arbitrarily referred to to justify collection of revenue when it is trite, that in a taxing statute there cannot be any intendment and/or equity about a tax. The court is bound to look at what is clearly stated in the Act. And the strict rule is that nothing can be read into or implied pursuant to the Act. Where there is an ambiguity the benefit must be given to the tax payer. In *Connaught Housing Development Sdn Bhd v Kerajaan Malaysia* [2003] 4 MLJ 753; [2003] 8 CLJ 144 which the appellant relies the court stated:

> In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. If there is any ambiguity in the interpretation of the relevant applicable section, then the benefit must be given in favour of the tax payer.

[9] We have read the appeal record, the memorandum of appeal and the submission of the parties in detail. We are grateful to the counsel for the comprehensive submissions. It will serve no useful purpose to repeat the submissions save to deal with the core issues. After having given much consideration to the submission of learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) it is trite that any person (specified) can be subject to an assessment and/or assessment notice pursuant to the ITA 1967. This is clearly spelled out in s 3 of the ITA 1967 which states:

> Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia.

(b) it is also trite that once an assessment is raised under the ITA 1967 the aggrieved person can appeal to the Special Commissioners of Income Tax pursuant to s 99. Section 99(1) states:

> A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment

for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.

[10] It must be noted here that any person who is mentioned in s 3 and where assessment is raised and intends to dispute the assessment will fall within the phrase of aggrieved person. However, if the person who is not mentioned in s 3 and is made a subject of assessment then s 99(1) will not apply ab initio and the said assessment can be declared null and void by a court of competent jurisdiction. A crude example of a person who will not be caught under s 3, will be a foreigner who has never stepped into Malaysia or has no nexus to Malaysia and the Revenue Department has purportedly raised an assessment.

[11] We must say the respondent's argument that once the assessment is raised and the assessee wants to dispute it; in all cases he falls within the meaning of 'aggrieved person' under s 99 of the ITA 1967 is flawed. If the assessment is a valid assessment dealing with persons stated in s 3 of the ITA 1967, then it follows from decided case laws and also as per the provisions of the ITA 1967 it can crystalise into a debt and be a subject matter of summary judgment. And any issue as to specific liability or quantum in such a case must be ventilated before the Special Commissioners of Income Tax and will not stand as triable issues when the Revenue Department attempts to recover the said sum pursuant to section s 106(3) of the ITA 1967 (see *Government of Malaysia v Margaret Au Nyat Fah* [2007] MLJU 608; [2007] 1 LNS 436).

[12] There is no equipollent to s 3 of the ITA 1967 in the Act. The general scheme of the Act does not apply to all persons. The Act will only be triggered if there is a disposal as envisaged in s 3 of the ITA. And the *sine qua non* for disposal is stated in the meaning of dispose. Further, paras 15–16 Schedule 2 of the Act in relation to s 7 (chargeable gains and allowable losses) further fortifies the argument that there must be complete disposal or receipt of the purchase price before liability can be attached. For example para 15(1)–15(3) states as follows:

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(1) Except where this Schedule provides otherwise, a disposal of an asset shall be deemed to take place —

(a) Where there is a written agreement for the disposal of the asset, on the date of such agreement; or

(b) Where there is no written agreement, on the date of completion of the disposal of the asset

(2) Except where this Schedule provides otherwise, where there is a disposal of

an asset, the date of acquisition of the asset by the acquirer shall be deemed to coincide with the date of disposal of that asset by the disposer to that acquirer.

(3) For the purposes of this Schedule —

(a) the date of completion of a disposal means —

(i) The date on which the ownership of the asset disposed of is transferred by the disposer; or

(ii) The date on which the whole of the amount or value of the consideration (in money or moneys worth) for the transfer has been received by the disposer,

Whichever is the earlier;

(b) a transfer of ownership of an asset is deemed to take place on the date when the last of all such things shall have been done under any written law as are necessary for the transfer of ownership of the asset

And para 16 states:

Where a contract for the disposal of an asset is conditional and the condition is satisfied (by the exercise of a right under an option or otherwise), the acquisition and disposal of the asset shall be regarded as taking place at the time the contract was made, unless —

(a) the acquisition or disposal requires the approval by the Government or a State Government or an authority or committee appointed by the Government or a State Government, the date of disposal shall be the date of such approval; or

(b) the approval referred to in subparagraph (a) is conditional, the date of disposal shall be the date when the last of all such conditions is satisfied.

[13] It must be noted that para 15(1)(a)–(b) is qualified by para 15(3). And in addition, para 16 qualifies the date of disposal when it is a conditional contract such as the instant case where the appellant is arguing that there is breach and there are two suits pending before the court which in our view will stand as triable issues.

[14] In *Matair bin Suhaili & Anor v Rose Foo Chin Lan & Ors* [2007] 6 MLJ 125; [2007] 5 CLJ 406 the Court of Appeal on the facts made the following observation:

> under real property gains tax 1976, a real property gains tax is chargeable in accordance with the Act in respect of chargeable gain on the disposal of real property and there is chargeable gain … chargeable gain is deemed to accrue on the date on which the whole of the value of the consideration was received by the first defendant.

[15] We are surprised to note that learned counsel for the Revenue Department did not bring to our attention a reported decision of Justice Aziah Ali J (as Her Ladyship then was) in the case of *Ketua Pengarah Hasil Dalam Negeri v The Pataling Rubber Estates Limited* [2010] MLJU 1301; where on similar issues the Special Commissioners have, inter alia, asserted that to be liable to real property gains tax, there must be chargeable gain within the ambit of s 3 of the Act. In that case the Special Commissioners' decision was upheld by the High Court and that will mean it will be wrong for the Revenue Department to raise an assessment when in law and fact the assessee is not liable to RPGT at the material time.

[16] We do not think it is necessary to go into further adumbration on the respondents right to summary judgment at this stage, as it is very clear from the instant case the appellant has raised triable issues which ought to be ventilated at a full trial taking into account that the Act will not apply to all persons and the *sine qua non* for the Revenue Department to trigger the Act must relate to a disposal as envisaged by the Act. It must not be forgotten that where the language of the Act is clear and explicit the court is duty bound to give effect to it. We must make it clear in the instant case the duty of the trial court is to ascertain whether there was in fact a disposal as envisaged by the Act. If the court comes to a finding in favour of the Revenue Department then the liability and/or quantum arising from the assessment cannot be a subject matter of dispute in the court exercising its original jurisdiction and that jurisdiction in the first instance is vested only with the Special Commissioners.

[17] It must also be stated that it is well settled that every exercise of statutory power (in this case the raising of an assessment) cannot be arbitrarily exercised. The Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35 had endorsed the proposition that every exercise of statutory power must not only be in conformity with the express words of the statute but above all must also comply with certain implied legal requirements. And the court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; *Saratogoa Sdn Bhd v Pentadbir Tanah Johor Bahru* [2013] 4 MLJ 431). The Revenue Department is not an exception to the said jurisprudence.

[18] For reasons stated above the appeal is allowed with costs of RM5,000 to be paid by the respondent to the appellant. The suit is fixed for case management before the High Court on 11 March 2013. The deposit is to be refunded to the appellant.

[19] We hereby order so. A

Clement Skinner JCA (dissenting):

[20] Mudek Sdn Bhd ('the appellant') brings this appeal against the decision of the learned High Court judge who on 14 January 2011 granted summary judgment to the Government of Malaysia ('the respondent') in the sum of RM1,532,508.67 being real property gains tax due and payable by the appellant to the respondent in respect of year of assessment 1996–1997 including a 10% increase thereof. B C

[21] It is the appellant's case that summary judgment under O 14 of the Rules of the High Court 1980 ('RHC') was wrongly granted against it as there were triable issues raised by it which require to be investigated at a full trial. The appellant identified these triable issues as: D

(a) whether there has been a 'chargeable gain' accruing to the appellant on the 'disposal' of its assets within the definition of those terms in the Real Property Gains Tax Act 1976 ('the RPGT Act')?

(b) whether on a disposal of its land, the appellant is chargeable to income tax or real property gains tax? E

(c) whether the appellant can appeal to the Special Commissioners of Income Tax under s 18 of the RPGT Act? and

(d) whether the appellant had received the notice of assessment sent to it by post?. F

[22] The appellant relies on the following background facts as giving rise to the above triable issues. On 23 April 1997 the appellant entered into a sale and purchase agreement with a company called Yeng Chong Realty Sdn Bhd ('Yeng Chong') wherein the appellant agreed to sell Yeng Chong a piece of land at Melaka ('the said land') for RM31,739,793.62. The appellant asserts that the sale of the said land to Yeng Chong was not completed as Yeng Chong did not fulfill its obligations under the sale and purchase agreement. As such the appellant contends that it cannot be said to have 'disposed' of its said land, nor can it be said that a 'chargeable gain' had accrued to the appellant within the meaning of those terms in the RPGT Act. Therefore, according to the appellant, it is not liable at all to pay any real property gains tax under the law. The appellant asserts that it has filed two civil suits ie S22–1468 of 2002 and S22–448 of 2005 against Yeng Chong in respect of the purchase price payable for the said land, which suits have not been concluded yet. Therefore, according to the appellant, the respondent's claim is premature. G H I

[23] I find no merit in the appellant's contention for the following reasons.

[24] The respondent's claim is for the recovery of real property gains tax which is due and payable by the appellant under s 21(1) of the RPGT Act. Under the scheme of the RPGT Act, the director general of Inland Revenue will proceed under s 14(1) to make an assessment of what tax is payable by a person upon that person making a return, (in the prescribed form), giving notice of the disposal of an asset. In this case it is clear from the documents in the record of appeal that after the appellant entered into the sale and purchase agreement with Yeng Chong, the appellant must have filed a return in accordance with s 13 of the RPGT Act giving notice to the director general of the disposal of its said land, because in para 15 of its statement of claim in S22–1468 of 2002 the appellant pleaded that it had received the notice of assessment dated 17 July 1999 for RM1,208,776.40 issued by the director general in respect of real property gains tax payable by the appellant. The appellant also knows that the amount payable has not been paid and why, because under the terms of the sale and purchase agreement it was agreed between the parties that the solicitors acting for Yeng Chong should retain a sum of RM765,477.84 ('the retention sum') from the purchase price to pay the appellant's real property gains tax, but it is pleaded by the appellant that Yeng Chong's solicitors did not retain this amount nor did the solicitors pay the amount over to the Inland Revenue on behalf of the appellant (see para 16 of the appellant's statement of claim in S22–1468 of 2002). It is now the appellant's case that since the 'disposal' of its said land was not completed, there is accordingly no 'chargeable gain' that has accrued to it, and therefore the respondent's claim is premature as the appellant is not obliged to pay any real property gains tax at all. Therefore, according to the appellant, summary judgment should never have been granted against it.

[25] In my view none of the matters relied on by the appellant are capable of raising a triable issue to the respondent's claim. Although the appellant maintains that it is not complaining that there has been a mistake or error in the assessment raised by the director-general, but only that it is not chargeable to any real property gains tax at all because it has not 'disposed' of its said land, in my view whatever terminology the appellant may wish to use to dress up its complaint, the fact remains that the appellant's present attempt to show that there has not been a disposal of its said land within the meaning of the term 'disposal' and 'chargeable gain' in the RPGT Act are not bona fide contentions because when the appellant was served with the notice of assessment dated 17 July 1999, if the appellant was aggrieved by that notice because it had allegedly not 'disposed' of its land as it now claims, then it was open to the appellant to have appealed against the assessment to the Special Commissioners of Income Tax under s 18 of the RPGT Act. The fact that the appellant did not do so but had instead asked Yeng Chong's solicitor to release the retention sum to enable payment of the real property gains tax shows that the appellant's arguments based on no 'disposal' and no 'chargeable gain' are issues which have been thought-up to give the semblance of there being a bona

fide triable issue. The same may be said about the other triable issues (b) and (c) earlier identified. The lack of bona fides in the appellant's contentions are exposed by the fact that in the two suits filed against Yeng Chong, the appellant pleaded that the reasons why the real property gains tax has not been paid is because Yeng Chong and its solicitors did not pay or release the retention sum for the real property gains tax, and not because there was no 'disposal' or no 'chargeable gain' or for the other reasons identified in issue (b) and (c) above.

[26] The reality which the appellant must face here is that generally speaking, when the Inland Revenue Board makes an application for summary judgment against a taxpayer under s 23 of the RPGT Act, case law shows that the court undertakes only a limited investigation to ascertain if the tax claimed is due and payable to government and the normal rules under O 14 of the RHC as to triable issues do not apply. In *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473; [1989] 1 CLJ (Rep) 9 the then Supreme Court (per Gunn Chit Tuan SCJ as he then was) approved and agreed with the dictum of Arulanandon J in *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276 where the latter had said that in income tax cases, when proceedings are commenced under O 14 of the RHC the normal rules as to triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. In my view that same reasoning will apply to cases concerning real property gains tax as well. And it will be seen that under the scheme of the RPGT Act, once an assessment has been made and notice of assessment served on a tax payer, the amount becomes due and payable.

[27] Thus s 21(1) of the RPGT Act states:

> Subject to this section, the tax payable under an assessment shall, on the service of the notice of assessment on the person assessed, be *due* and *payable* at the place specified in that notice whether or not that person appeals against the assessment. (Emphasis added.)

The significance of the words in the above section are well illustrated by the decision of the Federal Court in *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163. In that case too, the appellant there had raised a similar argument to the appellant here, and sought to argue that s 106(3) of the Income Tax Act 1967 which provides that in any proceedings under the section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased did not apply to a case where the taxpayer contends that no tax whatsoever is due by him, but the Federal Court did not entertain such a plea. In refusing to do so Gill FJ stated the law on the matter in this way (at p 164):

> There is a string of decided cases in which it has been held that the effect of the relevant provisions of the Income Tax 1967 is that on the service of a notice of assessment on the person assessed, the tax payable under the assessment becomes

> due and payable at the place specified in the notice, whether or not the person appeals against the assessment, and can then be recovered by the government by civil proceedings as a debt due to the government. On such civil proceedings being brought by the government, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

Gill FJ also approved of the following passage of the judgment of Choor Singh J in the case of *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282 where the later said:

> In my opinion, once the controller of Income Tax has made an assessment and issued a notice of assessment to a taxpayer calling on him to pay the tax mentioned in the notice, the tax payer is *bound by law* to pay such tax within one month even though he may be dissatisfied with the assessment. Whether the assessment is *right or wrong*, the tax must be paid notwithstanding any objection or appeal. (Emphasis added.)

In the same judgment Choor Singh J pointed out that under the scheme of the enactment, if the taxpayer is aggrieved at the assessment then he should apply to the controller to review the assessment and if the controller refuses to do so then the taxpayer may appeal to the board of review and if the taxpayer is dissatisfied with any decision of the board of review the taxpayer can appeal to the High Court, but a taxpayer has no right to by pass the board of review and take his complaint straight B-01(IM)-100–11 to court. The rationale for not allowing a taxpayer to do so is explained by Choor Singh J in these words:

> If this is not done every unwilling taxpayer will refuse to pay tax and when sued in court, will challenge the merits of the assessment, thus causing considerable delay in the collection of taxes. The proper course for every aggrieved taxpayer is to pay his tax and present his argument against the assessment made upon him before the board of review.

[28] Although *Sun Man Tobacco* was a case concerning the Income Tax Act, it was held by Chong Siew Fai J (as he then was) in *Government of Malaysia v Sim Soe Hoe* [1990] 1 MLJ 379 at p 381; [1990] 2 CLJ (Rep) 72 at p 74 that the Real Property Gains Tax Act 1976 contains similar or substantially similar provisions as those found in s 103(1) and (4) and 106(1) and (3) of the Income Tax Act, namely ss 21(1) and (4) and 23(1) and (3) of the RPGT Act. I respectfully agree with that view.

[29] Applying the ratio of the Federal Court in *Sun Man Tobacco*, the issue in this appeal is whether the real property gains tax which had been assessed on the appellant had become due and payable? That question must be answered in the affirmative for the following reasons. As already indicated above, s 21(1) of the RPGT Act expressly states that upon the service of the notice of assessment, the amount assessed shall be due and payable whether the person assessed appeals

against the decision or not. And s 21(4) of the same Act states that if the amount stated is not paid within 30 days of service of the notice of assessment, the director general may increase the sum payable by 10% which the respondent did in this case.

[30] Reverting to the facts here although the appellant claims that it did not receive the notice of assessment dated 17 July 1999, there cannot be any truth in this claim because in paras 15–16 of its statement of claim in both its suits filed against Yeng Chong, the appellant expressly pleaded that it had received the notice of assessment dated 17 July 1999 from the Inland Revenue Board in respect of the real property gains tax payable in respect of the said land.

[31] Section 18(1) of the RPGT Act allows a person who is aggrieved by an assessment to appeal to the Special Commissioners of Income Tax against such assessment, and s 20(1) of the RPGT Act expressly provides that an assessment shall become final and conclusive for all purposes of the Act as regards the amount of the tax assessed on the expiry of the time for appeal against the assessment. There is no evidence before the court that the appellant filed an appeal with the Special Commissioners against the notice of assessment dated 17 July 1999. Therefore the assessment of RM1,208,776.40 had become final and conclusive against the appellant.

[32] On the facts of this case, not only had the assessment become final and conclusive against the appellant (under s 20(1)), it had also become due and payable (under s 21(1)).

[33] The RPGT Act contains very clear provisions regarding how any tax due and payable may be recovered by the government. Section 23(1) provides that:

> Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government

And s 23(3) states that:

> In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 21 (4).

[34] Further, in this case the Director-General had for the purposes of the O 14 proceedings at the High Court, issued a certificate dated 3 December 2008 stating that the amount of RM1,532,508.67 was the amount due from the appellant. The evidential value of such a certificate is stated in s 48(1) which reads:

A In a suit under section 23 a certificate signed by the Director-General giving the name and address of the defendant and the amount of the tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.

B **[35]** In the light of all the above statutory provisions, the appellant's contention that there are triable issues which need to be further investigated at a trial or that there ought to be a trial for some other reason is unsustainable.

C **[36]** To conclude, the assessment raised against the appellant had become due and payable and became recoverable as a debt due to the government in accordance with the provisions of s 23 of the RPGT Act. The fact that the appellant may have a claim against Yeng Chong for alleged breaches of the sale and purchase agreement entered into does not, in my view, alter the fact that the assessment raised against the appellant had in accordance with the relevant D provisions of the RPGT Act earlier identified become a debt due to the government. In such circumstances on the hearing of the respondent's application for summary judgment, there was very little the High Court could do except to give judgment in favour of the respondent. See *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29.

E

[37] I would accordingly dismiss this appeal and affirm the decision of the learned High Court judge, with costs.

F *Appeal allowed with costs of RM5,000.*

Reported by Ashok Kumar

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